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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 19 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the service center for further review and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a [redacted] corporation established in January 2009, states that it operates an auto supplier business with focus on automotive electronics. The petitioner claims to be a subsidiary of [redacted] located in Beijing, China. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that "[the beneficiary] will expand his hiring of more professional[s] and has more workstation[s] available for such expansion . . . ." Counsel submits a brief and a letter from the petitioner's property manager in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive of managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new operation.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 9, 2009. The petitioner indicated on the Form I-129 that it operates an auto supplier business with focus on automotive electronics with one current employee and it did not indicate any gross annual income (actual or projected).

In support of the petition, the petitioner submitted a lease agreement for a single office and shared common areas, such as a conference room, display center, kitchen, restrooms, internet connection, and photocopier and fax machines. A Certificate of Occupancy issued on May 12, 2009 by a building official indicated the occupancy load of the leased premises is 2 (workstations). The petitioner also submitted photos of the office space and signage directly outside of the office and at the main entrance of the building.

The director issued a request for additional evidence ("RFE") on August 13, 2009, instructing the petitioner to submit, *inter alia*, a letter from the owner or property management company confirming that the U.S. company is actually occupying and currently maintaining the lease agreement.

In response to the RFE, the petitioner submitted a letter from the property manager of the leased premises that states:

> This letter will serve as confirmation that [the petitioner] currently has a lease and is occupying 202 square feet of office space within a 7,200 square foot suite at [redacted] [The petitioner's] office space can accommodate two (2) workstations of which both are currently occupied. The [petitioner's] Lease commenced on June 1, 2009 and will expire on May 31, 2010, unless renewed in advance.

The director denied the petition on September 26, 2009, concluding that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation. In denying the petition, the director found that the "petitioner has not secured sufficient physical premise to house the proposed L-1A Manager or Executive with the proposed staff."

On appeal, counsel submits a brief and second letter from the property manager of the leased premises that states:

> [The petitioner's] office space accommodates two (2) workstations of which both are currently occupied. Additionally, [the petitioner] has the use of a conference room, lobby and kitchen. [The petitioner's] rent will increase proportionally when it physically expands to take on a third and forth [*sic*] work station for new employees, in an additional office.
>
> We anticipate that [the petitioner] will opt for an expansion in the next six months and our goal is to accommodate them within our executive offices suite.

Discussion

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Upon review, counsel's assertions and the presented evidence are persuasive. The AAO finds sufficient evidence to establish that the petitioner has acquired physical premises as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The director's focus on the number of occupants for the single office specified in the lease was misplaced. The petitioner has established that it may readily lease additional office space in the same building when it hires the additional staff. The property manager's letter was very clear in that the office building will accommodate the petitioner in leasing additional space as needed. Further, the petitioner has not indicated that it will require physical premises other than office space, given the nature of the proposed activities.

The petitioner need only establish that sufficient physical premises to house the new office have been secured. The petitioner has met that burden.

III. Employment Abroad

Although the director's decision will be withdrawn, the AAO finds insufficient evidence in the record to establish that the foreign company employed the beneficiary full-time for one continuous year in the three-

year period preceding the filing of the petition. The petitioner stated that the beneficiary was employed with the foreign company beginning May 2008; neither the petitioner nor the foreign company provided the exact date that the beneficiary commenced his employment abroad. The petitioner indicated on the Form I-129 that the beneficiary's date of last arrival to the United States was May 28, 2009.

USCIS records indicate that the beneficiary arrived in the United States on March 2, 2009 and departed on April 1, 2009, and again arrived on April 14, 2009 and departed on April 24, 2009, for a total of 40 days in the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) states, in part:

> Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

In the instant matter, it is not clear whether the beneficiary meets the "one continuous year of full-time employment abroad" requirement at 8 C.F.R. § 214.2(l)(3)(iii). Given the approximate date that the beneficiary commenced work for the foreign company and the date of his last arrival in the United States, the 40 days he spent in the United States cause the beneficiary to fall short of the one continuous year of employment abroad.

Additionally, the petitioner submitted payroll records for the beneficiary's employment abroad. The payroll records indicate that the beneficiary's salary decreased exponentially from December 2008 to January 2009 and beyond. Neither the petitioner nor the foreign company provided an explanation for this change in salary; it is unclear if his salary changed due to a change in his job duties or his full-time employment status. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Due to the inconsistencies and deficiencies detailed above, the petitioner has not met its burden to establish that the foreign company employed the beneficiary for one continuous year in the three-year period preceding the filing of the petition. For this reason, the petition cannot be approved.

IV. Conclusion

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determinations on this issue. So far, the director has not done so. Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision dated September 26, 2009 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.